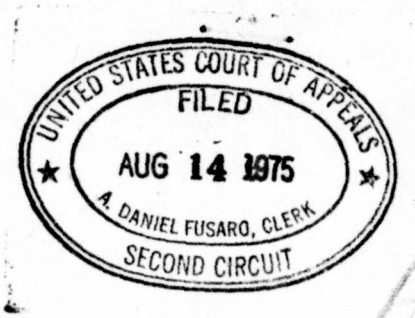
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC



UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

MILDRED IVES, MOIRA ROBERTSON & JOYCE CHAPMAN, on behalf of themselves and others similarly situated,	NO. 74-2131
Plaintiffs-Appellees,	
VS.	
W. T. GRANT COMPANY,	
Defendant-Appellant.	

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PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

In its opinion dated July 31, 1975 this Court affirmed an order of the United States District Court for the District of Connecticut, inter alia, granting plaintiffs' motion for partial summary judgment in this action alleging violations of the Connecticut Truth-in-Lending Act,[1] and denying defendant's motion to dismiss for lack of federal subject matter jurisdiction. It is respectfully submitted that the Court overlooked the following points of law:

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[1] The appeal also involved claims arising under the usury law of the State of Connecticut, §37-4 of the Connecticut General Statutes, and the Small Loan Act of the State of Connecticut, §36-243 of the Connecticut General Statutes. The issues with respect to these claims are not involved in this petition.

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1. There is no statute granting the Federal Reserve Board the power to create federal jurisdiction over claims arising under the Truth-in-Lending Act of Connecticut.

2. "Rules" of the Federal Reserve Board do not become part of Regulation Z.

3. The Fifth Circuit and the Ninth Circuit have adopted the doctrine of "great deference" with respect to staff opinions of the Federal Reserve Board.

ARGUMENT

I. Jurisdiction

The federal Truth in Lending Act requires the Federal Reserve Board (hereinafter referred to as the "Board") to exempt a state from the requirements of Chapter 2 of the Act if the Board determines that the state law meets certain standards. The controlling statute provides:

> The Board shall by regulation exempt from the requirements of this part [15 U.S.C. §§1631-44] any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement.
>
> 15 U.S.C. §1633

Effective August 1, 1970, the Board granted Connecticut an exemption from the federal law:

> Except as provided in §226.12(c), all classes of credit transactions within the State of Connecticut are hereby granted an exemption from the requirements of Chapter 2 of the Truth in Lending Act [15 U.S.C. §§1631-42]. . . .
>
> 12 C.F.R. §226.12 Supplement III(e), 35 Fed. Reg. 11992 (July 25, 1970).

The Court held "that the exemption granted to the State of Connecticut did not affect the jurisdiction of the court below to hear this suit under 15 U.S.C. §1640".

Section 1640 creates a private cause of action only against "any creditor who fails to comply with any requirement imposed under this chapter [2]. . ."[2] and further provides: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction. . ."[3] Thus §1640 applies only to violations of Chapter 2 of the federal Act, and since credit transactions within Connecticut are exempt from Chapter 2 of the federal Act, §1640 by its terms does not create federal jurisdiction over a civil suit claiming a violation of the requirements of the Connecticut Act.

However, 12 C.F.R. §226.12(c) referred to in the Regulation exempting Connecticut provides:

> In order to assure that the concurrent jurisdiction of Federal and State courts created in section 130(e) of the Act [15 U.S.C. §1640(e)] shall continue to have substantive provisions to which such jurisdiction shall apply, and generally to aid in implementing the Act with respect to any class of transactions exempted pursuant to paragraph (a) of this section and Supplement II, the Board pursuant to sections 105 [15 U.S.C. §1604] and 123 [15 U.S.C. §1633] hereby prescribes that:

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[2] 15 U.S.C. §1640(a)

[3] 15 U.S.C. §1640(e)

> (1) No such exemption shall be deemed to extend to the civil liability provisions of sections 130 [15 U.S.C. §1640] and 131 [15 U.S.C. §1641]; and
>
> (2) After an exemption has been granted, the disclosure requirements of the applicable State law shall consti tute the disclosure requirements of this Act, except to the extent that such State law imposes disclosure requirements not imposed by this Act. Information required under such State law with the exception of those provisions which impose disclosure requirements not imposed by this Act shall, accordingly, constitute the "information required under this chapter" (Chapter 2 of the Act) for the purpose of section 130(a) [15 U.S.C. §1640(a)].

But for 12 C.F.R. §226.12(c) there would be no federal jurisdiction of the truth in lending claims made in this case. Neither 15 U.S.C. §1633 nor any other statute grants the Board the power to adopt Connecticut law as federal law in order to create federal jurisdiction over claims arising under the Connecticut Truth-in-Lending Act.

The petitioner's basic claim in this action is that federal jurisdiction is restricted to the precise limits which Congress has defined by statute. In its opinion, the Court does not discuss this claim.

II. 15 U.S.C. §1640(f) - Good Faith Compliance

This recent amendment to the federal Act provides:

> No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

In its opinion the Court held "that the reference in subsection (f) to 'any rule, regulation, or interpretation thereof by the Board' means those requirements of truth in lending that have become part of Regulation Z, 12 C.F.R. §226". Apparently, the Court overlooked the fact that "rules" of the Board do not become part of Regulation Z. 12 C.F.R. §226. Thus, the Court never considered whether reliance by the petitioner on action "by the Board", other than that contained in Regulation Z, was legally sufficient under 15 U.S.C. §1640(f).

The petitioner claims that its reliance on action "by the Board" was legally sufficient under §1640(f). Petitioner relied on the Federal Reserve Board Publication "What You Ought To Know About Truth in Lending" which states on its cover "prepared by the Board of Governors of the Federal Reserve Board". Petitioner also relied on the letter of

Kenneth Kenyon, Deputy Secretary, of the Federal Reserve Board. That letter provides in relevant part:

> It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration.
>
> Letter No. 444, March 1, 1971, [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases - Correspondence] CCH Consumer Credit Guide ¶30,640.

III. "Great Deference" Doctrine

The cases of Bone v. Hibernia Bank, 403 F.2d 135 (9th Cir. 1974) and Philbeck v. Timmer Chevrolet, Inc., 499 F.2d 971 (5th Cir. 1974), cited in the petitioner's brief, held that staff opinions of the Board were entitled to "great deference". In Philbeck the doctrine was stated as follows:

> . . .the construction which the Federal Reserve Board gives its own Regulation Z in its Interpretations and staff opinions is especially entitled to great deference "because of the important interpretive and enforcement powers granted this agency by Congress" in this highly technical field.
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> 499 F.2d at 977

These cases were neither discussed nor cited by the Court in its opinion. The issue of the weight to be given a staff letter of the Board is dealt with in one sentence as follows:

> As to the weight to be given the letter itself, plaintiffs call to our attention the short shrift a similar staff letter received in Ratner, supra, 329 F. Supp. at 278-79.

In view of the proliferation of truth in lending suits in the federal courts, the issues involved in this petition are of exceptional importance within the meaning of Rule 35 of the Federal Rules of Civil Procedure. In a recent case in the District of Connecticut, the Court described this proliferation as follows:

> . . . in the Northern District of Georgia . . . 292 truth-in-lending cases were filed in the first half of fiscal year (FY) 1974 and 349 in the first half of FY 1975. Semi-Annual Report of the Director of the Administrative Office of the United States Courts 23 (1975). Though the District of Connecticut had only two such cases in the first six months of FY 1972 and five in the first six months of FY 1973, already our truth-in-lending filings have climbed to second in the nation, with 39 in the first half of FY 1974 and 78 in the first half of FY 1975, id.
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> Gennaro J. Solevo v. Aldens, Inc. (Civ. No. N-74-313, March 29, 1975).

Respectfully Submitted,

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Dated: August 14, 1975

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, this day to Messrs. Clendenen & Lesser, 152 Temple Street, New Haven, Connecticut; Stuart Bear, Esq., Zeldes, Needle & Cooper, 333 State Street, Bridgeport, Connecticut; Frank Cochran, Esq., 413 Howard Avenue, New Haven, Connecticut; and John Nicoll, Esq., Federal Reserve Board, Deputy General Counsel, Washington, D.C. 20551.

William J. Egan